

Timothy J. O'Hanlon, OSB No. 87309  
MAUTZ BAUM & O'HANLON, LLP  
101 SE BYERS AVE  
PO BOX 628  
PENDLETON OR 97801-0628  
Telephone: (541) 276-2811  
Fax: (541) 276-0543  
E-mail: mbo@mautzetal.com  
Attorneys for Defendant Frank J. Spokas, Jr., M.D.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

GLENN H. SONSTENG, Personal	)	Civil No. 3:06-CV-476-SU
Representative of the Estate of	)	
EDNA M. SONSTENG, Deceased,	)	
	)	
Plaintiff,	)	
	)	MEMORANDUM IN SUPPORT OF
v.	)	DEFENDANT SPOKAS' OBJECTION
	)	TO MAGISTRATE'S FINDINGS
THE DOMINICAN SISTERS OF	)	AND RECOMMENDATIONS
ONTARIO, INC., an Oregon	)	
non-profit corporation, dba HOLY	)	
ROSARY MEDICAL CENTER;	)	
JOSEPH J. BOYLE, M.D., and	)	
FRANK J. SPOKAS, M.D.,	)	
	)	
Defendants.	)	

**I. ORS 30.075 PROHIBITS PLAINTIFF FROM MAINTAINING A SURVIVAL ACTION. THE COURT SHOULD DISMISS PLAINTIFF'S SURVIVAL CLAIM.**

Defendant Spokas moved to dismiss plaintiff's survival action on the ground ORS 30.075(3) prohibits a survival action when plaintiff alleges the defendants caused plaintiff's death. The Findings and Recommendation denied that motion

1 - MEMORANDUM IN SUPPORT OF DEFENDANT SPOKAS' OBJECTIONS TO  
MAGISTRATE'S FINDINGS AND RECOMMENDATIONS (Case No. 3:06 CV-476-SU)

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on the ground plaintiff can alternatively allege both survival and wrongful death claims. This finding is erroneous because Plaintiff alleged a wrongful death claim. Plaintiff alleged the defendants caused Ms. Sonsteng's death.

ORS 30.075(3) provides:

**"If an action for wrongful death under ORS 30.020 is brought, recovery of damages for disability, pain, suffering and loss of income during the period between injury to the decedent and the resulting death of the decedent may only be recovered in the wrongful death action."** [Emphasis added.]

ORS 30.020 permits the personal representative to pursue a claim when the death of a person is caused by the wrongful act or omission of another. Plaintiff alleged Ms. Sonsteng "...died as a direct and proximate cause of defendants' negligence." Amended Complaint, ¶ 4. Plaintiff's Amended Complaint, ¶ 8 also alleges Ms. Sonsteng: "...died as a result of defendants' negligence." Because plaintiff alleges defendants caused Ms. Sonsteng's death, plaintiff has brought a wrongful death claim under ORS 30.020. Under the unambiguous language of ORS 30.075(3), plaintiff's damages are only recoverable under ORS 30.020.

The Findings and Recommendation did not address or interpret the relevant statutory language. Instead, the Findings and Recommendation are based on F.R.Civ.P. 8(a) which permits alternative and inconsistent pleadings. Rule 8(a) is not applicable. Plaintiff clearly pled a wrongful death claim. Therefore, plaintiff is bound by the limitations in ORS 30.075(3)

Defendant Spokas' motion to dismiss is based on the unambiguous language of ORS 30.075(3). The Oregon legislature adopted the current ORS 30.075(3) language after appellate decisions interpreted former statutory language

as permitting both a wrongful death and survival action. See *Roe v. Pierce*, 102 Or App 152, 794 P2d 4 (1990), *vacated* 313 Or 228 and *Doe v. American Red Cross*, 128 Or App 38, 43 at n. 5, 874 P2d 828 (1994), *affirmed* 332 Or 502 (approving of relevant language in *Roe*). No appellate decision interprets the current ORS 30.075(3) language.

This court must apply the statute according to the legislature's intent. *Portland General Elec. Co. v. Bureau of Labor & Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). The legislature's intent is clear from the unambiguous language of ORS 30.075(3). Plaintiff cannot maintain a survival action. The court should dismiss plaintiff's survival claim allegations.

**II. BECAUSE PLAINTIFF CANNOT MAINTAIN A SURVIVAL CLAIM, THE COURT SHOULD STRIKE CLAIMED DAMAGES IN EXCESS OF THE STATUTORY CAP.**

Defendant Spokas moved to strike Plaintiff's damage claims in excess of the statutory cap. The Findings and Recommendation denied that motion, stating the court may reduce the damages if Plaintiff prevails on the wrongful death claim. Defendant Spokas objects to that finding. Because Plaintiff cannot maintain a survival action under the Amended Complaint allegations, the court should strike the excess damage allegation.

DATED this 10th day of July, 2007.

MAUTZ BAUM & O'HANLON, LLP

By: /s/Timothy J. O'Hanlon  
Timothy J. O'Hanlon  
OSB No. 87309  
Attorneys for Defendant  
Frank J. Spokas, M.D.  
(541) 276-2811

**RE: SONSTENG v. THE DOMINICAN SISTERS OF ONTARIO, INC.,  
ET AL**  
**CASE NO.: 3:06-CV-476-SU**  
**DOCUMENT: MEMORANDUM IN SUPPORT OF DEFENDANT SPOKAS'**  
**OBJECTION TO MAGISTRATE'S FINDINGS AND**  
**RECOMMENDATIONS**

**CERTIFICATE - TRUE COPY**

I HEREBY CERTIFY that the foregoing copy of the above-named document(s) is a complete and exact copy of the original.

MAUTZ BAUM & O'HANLON, LLP  
Attorneys for Defendant Spokas

By: \_\_\_\_\_  
Timothy J. O'Hanlon

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**CERTIFICATE(S) OF SERVICE**

**Electronic Filing:** I HEREBY CERTIFY that I served the above-named document(s) on the following by electronic filing on July 10, 2007:

MR BERNARD JOLLES  
JOLLES & BERNSTEIN PC  
721 SW OAK ST 2<sup>ND</sup> FLR  
PORTLAND OR 97205

Attorneys for Plaintiff Sonsteng

MR CARL BURNHAM JR  
YTURRI ROSE LLP  
89 SW 3<sup>RD</sup> AVE  
PO BOX S  
ONTARIO 97914

Attorneys for Defendant Dominican  
Sisters of Ontario, Inc.

**FAXING/MAILING:** I HEREBY CERTIFY that I served the above-named document(s) on the following by **FAXING AND MAILING** a **TRUE COPY** thereof, certified by me as such, contained in a sealed envelope with postage fully prepaid, addressed to the last known address and deposited in the post office at Pendleton, Oregon, on July 10, 2007:

MR DAVID C LANDIS  
ATTORNEY AT LAW  
1515 SW 5<sup>TH</sup> AVE #844  
PORTLAND OR 97201

Attorney for Defendant Boyd, M.D.

FAX NO. 503-224-5826

MAUTZ BAUM & O'HANLON, LLP  
Attorneys for Defendant Spokas

By: /s/ Timothy J. O'Hanlon  
Timothy J. O'Hanlon

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MAGISTRATE'S FINDINGS AND RECOMMENDATIONS (Case No. 3:06 CV-476-SU)